

Circuit Court of Appeals

FOR THE NINTH CIRCUIT. 9

LOUIS STRADA,

Plaintiff in Error,

vs.

THE UNITED STATES OF
AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

A. L. WISSBURG,

Attorney for Plaintiff in Error.

O'KEEFE & VAN WINKLE,

Of Counsel.

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UNITED STATES
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LOUIS STRADA,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,
Defendant in Error.

**Opening Brief of Plaintiff in
Error.**

STATEMENT OF CASE.

The information herein charges plaintiff in error with violation of Sections 3 and 21 title II National Prohibition Act of October 28, 1919. The information is in two counts. The first count thereof charges the defendant and plaintiff in error with the sale of one-half pint of whiskey containing alcohol in excess of $\frac{1}{2}$ of 1% alcohol by volume said whiskey being intoxicating liquor, fit for beverage purposes, in violation of Section 3 title II of the National Prohibition Act of October 28, 1919.

Second count of the information charges that on or about the 8th day of October, 1920, to and including the 8th day of November, 1920, in San Diego, County of San Diego, the plaintiff in error, knowingly, wilfully and unlawfully main-

tained a common nuisance, to-wit: a room, building and place containing intoxicating liquor, to-wit: wine and whiskey containing alcohol in excess of $\frac{1}{2}$ of 1% of alcohol by volume and same were sold, bartered and given away in violation of Section 21, title II of the National Prohibition Act of October 28, 1919; to which information and each count thereof the defendant pleaded not guilty.

Trial of the cause was had on October 31, 1921. The verdict of the jury was as follows: "We, the jury in the above entitled cause, find the defendant, Louis Strada, as charged in the first count of the information; and guilty as charged in the second count of the information. San Diego, California, October 31, 1921, John N. Haskell, foreman." Transcript of Record p. 18.

Motion to set aside the verdict, and in arrest of judgment were duly made by counsel for the defendant and plaintiff in error and were by the court denied, whereupon the court pronounced judgment that the defendant stand committed to the San Diego County Jail for the term and period of one year on the second count. Defendant excepted to the judgment of the court and the denial of the motions aforesaid (T. R. pp. 19 and 20.)

ARGUMENT.

Plaintiff in error contends that the evidence was insufficient to justify the verdict of the jury

as to the second count in the information, in that the evidence failed to show, First, that there was sold on the premises, referred to in the information, intoxicating liquor containing more than one-half of 1% alcohol by volume and Second, that the said Strada had knowledge of the alleged sale or the keeping of the same on the premises, if any sales were made or any of said intoxicating liquors were kept on the premises.

As to the first contention that the evidence does not support the conclusion that there were sales of intoxicating liquors containing by volume more than one-half of one per cent. alcohol, we beg to briefly call the court's attention to the testimony given by the witnesses for the government at the trial relating to this issue.

B. M. MOSSHOLDER, a witness for the government testified in substance, (T. R., pp. 34 to 37, inclusive), I bought a drink of wine from a man named Joe and paid him therefor 50c. I don't know what he did with the money, I did not get the drink from Strada; do not know whether this property was Joe's or Strada's. I could not swear under oath that the alcoholic contents of this wine was more than one-half of 1%. He brought in what I call "Dago Red". On cross-examination the witness testified that Dago Red looks like grape juice, and that Dago Red contains more

than one-half of 1% alcohol in volume. I did not call for Dago Red.

J. J. FINNEGAN, a witness for the government testified in substance: (T.R., pp. 37 to 41 incl.). I went to the front of the cafe and spoke to Strada. This was September 30, 1920. I told him I wanted whiskey. He said that he was out, but had a little wine. And the witness purchased this alleged wine and paid therefor the sum of 50c. It is not clear from the testimony of this witness that defendant, Strada served him with this alleged wine. On page 39 (T. R.) the witness testified on direct examination: Strada has never sold me wine. Strada didn't serve me, he told me to go to the rear of the store, the first time. I did not see the waiter talking to Strada at this time. On cross examination, the witness testified "I call what was served me Dago Red". On re-cross examination page 41, the witness testified "I did not get any whiskey there. I did not speak to Mr. Strada about any whiskey."

HUGH ROCHEFORD, a witness for the government testified (T. R., pp. 41 to 43 inclusive). On November 28 witness testified that he was served with whiskey in a mug, and that there accompanied him at the time, a woman who was also served in like manner, and that the same was served by Bonacorsi and he bought one-half pint of whiskey and paid \$4.00 for it to this said last

mentioned person. Did not see Strada there that night, and don't know whether he (Strada) got the money or not. Don't know where this waiter got the liquor from. It was stipulated that this liquid contained in excess of one-half of 1% in alcohol by volume. Witness further testified (T. R., pp. 43), It might be fit for beverage purposes for some people, but it wouldn't be for me. We call the court's attention that the first count of the information alleges the sale of whiskey at the time and place as testified to by this witness. The jury, however, were unable to reach a verdict as to the first count of the information.

GEORGE SEARS, a witness for the government testified (T. R., pp. 44 to 49 inclusive). Witness is a police officer of the City of San Diego, California. He received the bottle of whiskey alleged to have been purchased by the witness Rocheford, after Mr. Rocheford came out on the street. This bottle of liquor was received as evidence as the government's exhibit 3. This witness was allowed to testify as to the reputation of this place in a general way, and made statements that the defendant Strada was arrested a number of times previous, but the witness did not state upon what charge, and also the complaint of bootlegging had been made concerning Strada's place. The witness's testimony in this particular was most vague and uncertain, and should not be entitled to any

weight, same being mere conclusions of the witness and entirely hearsay, based on rumors.

R. W. CHADWICK, a police officer of the City of San Diego also testified for the government (T. R., pp. 49 to 54, inclusive). Testimony of this witness corroborated the testimony of officer Sears. And also developed the testimony that in a tea pot in the kitchen of said defendant, the witness found some liquid, which he described as whiskey, and being the same as government's Exhibit 3. It does not appear how much whiskey was in this tea pot. The contents of the tea pot was poured into another receptacle, as government Exhibit 6 in the trial of the action. Neither officers Chadwick nor Sears testified that the defendant Strada was there that night, or at the time that the place was visited by these officers, and the same being the night when the bottle of whiskey was sold to the witness Rocheford. Witness Sears testified (T. R., pp. 49). That some days afterward he had a talk with defendant Strada, and the defendant stated that he had been sick for four or five days. And testified that he thought Strada told him that Bonacorsi was working for him as a waiter, and that he (Strada) had told Bonacorsi not to violate the law.

Defendant Strada testified on his own behalf, and also his wife Katherine Strada (T. R. pp. 55 to 60, inclusive). Both witnesses testified to lack

of knowledge of any sale of intoxicating liquor on said premises, containing in excess of one-half of 1% alcohol, also that on the date of the alleged sale of the bottle of whiskey to Rocheford, that the defendant Strada was home, sick in bed. Mr. Strada also attempted to show that he had on the premises grape juice, and that he purchased grape juice. (T. R., p. 65.)

We submit that there is an entire lack of evidence tending to show that the beverages at Strada's place, contained more than one-half of 1% alcohol in volume, except as to the bottle of whiskey, which was alleged to have been sold but on which the jury were unable to reach a verdict. And we may reasonably presume that the jury were unable to determine that this sale of whiskey was with Strada's knowledge.

U. S. vs. Dodson, 268 Federal, 397.

Such evidence is insufficient to support the theory that the plaintiff in error had knowledge of any alleged sale or of the presence of the alleged intoxicating liquor or that he knew it was being kept on the premises.

Moran vs. U. S., 264 Federal, 768;

Ousler, vs. U. S., 263 Federal, 968;

Yassce vs. U. S., 276 Fed., 497;

Holmes vs. U. S., 269 Fed., 489;

Wiggins vs. U. S., 272 Federal, 41.

Nor does it appear from the evidence that the sales were continuous or recurrent.

U. S. vs. Cohen, 268, Fed., 420.

The court erred in over-ruling plaintiff in error's objection to the following question:

Q. What did you do on that occasion (September 30, 1920)? Objected to on the grounds that the question is incompetent, irrelevant and immaterial, and not covered by the pleading. (T. R., p. 27.)

State vs. Benson, 154 Iowa, 313, (134, N. W., 851).

The court erred in refusing to permit the plaintiff in error to testify in response to the following question (T. R., p. 31):

Q. Mr. Strada along about the 7th day of October and on or about the 13th day of November, did you get a barrel of grape juice from the California Importing Company? Which question was objected to by the government and the objection sustained, as was also,

Q. How did you buy grape juice?

This testimony was intended as a part of Mr. Strada's defense. He had a right, we submit, to show, that he had grape juice on the premises for sale. And which fact would be some evidence to explain Mr. Strada's statement to the gov-

ernment's witness Finnegan, when Mr. Finnegan asked Mr. Strada if he could fix him up a little drink or words to that effect. Mr. Strada told him to go to the back of the store. And it would not be out of the ordinary, if Mr. Strada referred to this grape juice as wine. And the fact that grape juice was being sold in this restaurant would make it very easy for the waiters to carry on a little business "on the side" and for their own profit and without the proprietor's knowledge. We, therefore, believe that Mr. Strada should have been permitted to have shown fully his defense in this particular.

It is respectfully submitted that the judgment of the District Court should be reversed.

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